Livingston Middleditch Co., 149 to 153 Leonard St. Telephone [illegible]

Brief of Coudert & King for

Filed Mar. 4, 1895.

Supreme Court of the United States.

In the Matter of the petition of GEORGE F. UNDERHILL, for a writ of certiorari, &c., in the case of

GEORGE F. UNDERHILL,
Plaintiff,

AGAINST

JOSE MANUEL HERNANDEZ,
Defendant.

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BRIEF FOR DEFENDANT.

Statement of Facts.

In the early part of the year 1892, a revolution broke out in Venezuela, which lasted until about October 6, of the same year. The principal parties to this conflict were those who recognized Palacio as their chief, and those who followed the leadership of Crespo. General Hernandez, the defendant in error, was one of the principal officers in the army under General Crespo, and commanded the District of Guayana, in which the City of Bolivar is situated. The party headed by Crespo was finally successful and entered the City of Caraccas on October 6, 1892 (Record, fol. 262). The Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the United States on October 26, 1892, and was at the time of the trial of this action the recognized government of that country (Record, fol. 340). It had been

recognized as the legitimate Venezuelan goverment by other foreign powers before that time.

In August, 1892, General Hernandez was in command of an army composed of the adherents of Crespo; his troops were encamped near the City of Bolivar. Sometime previous to this, an army, under General Santos de Carrera, composed of the adherents of Palacio, was sent out against General Hernandez. A battle between the two armies took place at Buena Vista, about seven miles from Bolivar, on August 8, 1892, in which the Carrera army was defeated and General Carrera killed. On August 13, General Hernandez entered Bolivar at the head of his troops, and at once assumed command of the city and surrounding district. Between the date of the battle of Buena Vista and General Hernandez' entry into Bolivar, all the officials of the city left the country, and the vacant positions were filled by General Hernandez (fol. 282 *et seq.*). There is no evidence of any conflict after this occupation of the city, nor any evidence that the appointees of General Hernandez are not still holding their offices.

At the time of the alleged grievance and for several years prior thereto, the plaintiff in error resided with his wife at Ciudad, Bolivar, in the Republic of Venezuela, where he was engaged in the management of the water works which supplied water to that city (see plaintiff's affidavit, p. 31). Some time after the entry of General Hernandez, Underhill *applied to him as the officer in command for a passport to leave the city.* General Hernandez refused this request, and also repeated requests made by others in his behalf, until October 18, when a passport was given by General Hernandez and the plaintiff left the country.

While one of the alleged grievances of the plaintiff in error consists of a charge of forced confinement in his own house, it appears that the house in which he resided belonged to the municipality (fol. 324). That the defendant in error desired possession of it for his troops, but upon plaintiff's persistent refusal to vacate, he abstained from using any force to secure entry in the premises. As an illustration of the singular for-

bearance which marked the defendant's conduct while in absolute and undisputed control, it is interesting to read plaintiff's testimony, when his anxiety to appear in a heroic role overcame his usual caution, as a witness in his case. "The General," he says, "sent to implore me to let him have the house. I told him 'No!' (see fols. 434 to 436). When it is found, in addition to this, that it was plaintiff's duty to supply the city with water, and that he deliberately refused to do so in writing, and declared that he would never again run the water works (Record, fol. 364), it becomes plain that all the trouble arose from the anxiety of General Hernandez to have the water supply continued, and that he was willing to allow the plaintiff, who was the contractor, to leave the house, if he would give security to satisfy him of his intention to return (see plaintiff's testimony, page 97, fol. 386 and following).

The plaintiff admits that General Hernandez was at the head of an army, and that General Santos Carrera went out with troops against him (Record, fols. 264–265). That there was a conflict between the two armies, and that in the conflict General Hernandez' army was successful, and General Carrera killed. The defendant entered the City at the head of an army (Record, fols. 282–283), and to use the plaintiff's language, he was "the Great Mogul" at the time. In all his subsequent interviews the plaintiff assumes that the defendant was the General in command, he so addresses him in the letter of September 24 (fol. 361), and he and his friends apply to him as an officer in authority who had the right to grant and refuse passports. And at folio 356 he says: "When General Hernandez came in, he assumed command. He assumed all the government authority therein."

The contention of plaintiff in error as presented to the trial Court below may be found at fol. 516 *et seq.*

The Court directed the jury at the close of the plaintiff's case to find a verdict for the defendant. Judgment was entered for the defendant upon this verdict and the case was removed to the Circuit Court of Appeals by writ of error.

The Circuit Court of Appeals affirmed the judgment appealed from upon the ground that the acts complained of were done by the defendant in the legitimate exercise of belligerent powers; that he was a military commander of an army in a civil war in Venezuela, and that his acts as such commander were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government. The Court of Appeals was also of the opinion that the evidence was not sufficient to have warranted a finding that the defendant was actuated by malice or any personal or private motive (Petition, p. 11).

The only question in the case, if there be any, is, how far was the defendant, while in the actual control of the Government, bound to give the plaintiff in error a passport without any condition or qualification whatever; that he was ready and willing to issue such a passport on certain terms of not impossible compliance is shown by the plaintiff himself. "If I had given this bail to go back he might have given me a passport, but I did not think he had the right to ask me that" (Record, fol. 390).

In Mr. Underhill's judgment it was "audacity" on General Hernandez' part to make such a request (fol.).

Points.

This Court has, in the case of Law Ow Bew (141 U. S., 583), and in re Woods (143 U. S., 202), passed upon the cases in which a writ of certiorari should issue under Sec. 6 of the Act of March 3, 1891, c. 517. This Court holds that *the power should be exercised sparingly*, and should be used only when the matter is of sufficient importance in itself, *and sufficiently open to controversy to make it a duty of this Court to issue the writ applied for.* This must be so when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this Court of the oppres-

sive burden of general litigation, which impeded the examination and disposition of cases of public concern and delayed citizens in the pursuit of justice.

There is no principle of law involved in this case open to controversy.

This is an attempt to hold the defendant in the Courts of this country for his acts as a military commander of an army in Venezuela, while representing a *de facto* Government in the prosecution of a war, which Government has since been recognized by the United States as the legitimate Government of Venezuela. The Circuit Court of Appeals held that the defendant's acts as such military commander could not be made the subject of inquiry in a civil action in the Courts of this country. This proposition of law, so well sustained by the reasoning of the able opinion of that Court, and by the authorities therein cited, is no longer open to controversy. It has the support not only of the decisions of this Court but of the Courts of England and of the opinions of writers on international law.

This Court has passed upon the question in the following cases:

Lamar *v.* Brown, 92 U. S., 187;
Williams *v.* Bruffy, 96 U. S., 185;
Coleman *v.* Tennessee, 97 U. S., 509;
Ford *v.* Surget, 97 U. S., 594;
Dow *v.* Johnson, 100 U. S., 158;
Freeland *v.* Williams, 131 U. S.

All these cases arose during the rebellion, and either involved injuries to the person or property of our own citizens or the acts of officers of the Confederate army.

Ford *v.* Surget, *supra*, seems to be one of the strongest cases against the contention of the plaintiff in this action. In that case the defendant was an officer of the Confederate army and as such destroyed cotton belonging to others to prevent it falling into the hands of the United States. Thus we have

a case where the acts were committed in the course of an *unsuccessful rebellion* and by *the officers of an army of the enemy* of our country. This Court held that the acts complained of were acts of war on the part of the military forces of the rebellion, for which the person executing such orders was relieved from civil responsibility. This Court also held that the only question to be determined in such cases was simply whether there was a war and not whether it was successful. "The Confederate Government is to be regarded by the Courts as simply the military representative of the insurrection against the authority of the United States. To the Confederate army was, however, conceded, in the interests of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other—that concession placing the soldiers and officers of the rebel army as to all matters directly connected with the mode of prosecuting the war on the footing of those engaged in lawful war and exempting them from liability for acts of legitimate warfare."

In the case of Dow *v.* Johnson, *supra*, the action was brought on a judgment recovered against General Dow in the civil courts of Louisiana for goods belonging to the plaintiff Johnson, a *citizen and resident* of New York, while the southern portion of Louisiana was in possession of the Union army. It was claimed also that the acts of the defendant were malicious. This Court held that the courts of Louisiana had no jurisdiction to entertain such an action; that the judgment was void. The proposition of law is thus laid down: "An officer of the army of the United States while serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts, *nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military ne-*

cessity. He was subject to the laws of war and amenable only to his own government."

This Court says in the more recent case of Freeland *v.* Williams, *supra*, at page 416: "Ever since the case of Dow *v.* Johnson, 100 U. S., 158, the doctrine has been settled in the Courts that in our late civil war each party was entitled to the benefit of belligerent rights, as in the case of public war, and that for the act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority."

The same questions were involved in Lamar *v.* Browne, *supra*, and Coleman *v.* Tennessee, *supra*, and the same conclusion reached.

The opinion of Judge Wallace attached to the petition cites numerous cases and authorities which show that the decisions of this Court are in accordance with the known and settled principles of international law, or, more properly speaking, of the law of nations.

It is a principle of the law of nations that when an act is performed by a person in the exercise of public authority he cannot be held responsible for the results of such an act in the courts of any foreign country. Thus, Westlake (Private International Law, 3 ed., §190) says: "Foreign states, and those persons in them who are called sovereigns, whether their title be Emperor, King, Grand Duke or any other, and whether their power in their states be absolute or limited, cannot be sued in England on their obligations, whether *ex contractu*, *quasi ex contractu*, or *ex delicto*." The same rule is laid down in Hall on International Law, § 102, as particularly applicable to officers in command of the armies of a foreign state, and their subordinates.

The Courts of England have in several important cases considered this subject and reached the same conclusion as this Court.

The leading case there is the Duke of Brunswick *v.* The King of Hanover, 2 House of Lords Cases, 1. The defendant, though the King of Hanover, was

a British subject, but the acts which the plaintiff complained of were done by him in his official capacity. The Court in holding that the action could not be maintained, says, the Lord Chancellor delivering the opinion :

" A foreign sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country, whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a sovereign effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of the authority vested in him as sovereign. * * * It is true the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but notwithstanding that it is so stated, still *if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it.*"

Judge Wallace, in his opinion, cites also the cases of Moondalay *v.* Morton, 1 B. C. C., 469; Nabob of Arcot *v.* The East India Company, 4 B. C. C., 180, in which the same conclusion was reached.

Before this Court was called upon to decide the question involved in the case the law officers of this government had advised the executive department, and admitted to the representatives of foreign government that the official acts of the representative of a foreign government could not be made the subject of inquiry by our tribunals, and that our courts, upon being advised of the nature of such an action, would dismiss the suit if a civil action, or discharge the accused if held on an indictment.

Bradford, 1 Op., Atty.-Genl., 45, 46;
Lee, Atty.-Genl., 1 Op. Atty.-Genl., 81;
Webster, Atty.-Genl., in McLeod case, Vol. 5, Webster's Works, p. 129;

This principle is so well established by reason and

authority that it certainly cannot be regarded as requiring further discussion, and was regarded by the Circuit Court of Appeals as being decisive of the case.

While the petitioner seems to concede this position, he contests what he terms the second position of the Circuit Court of Appeals, viz.: that the success and final recognition of the revolutionary party legalized its prior acts irrespective of any recognition of belligerent rights. This question was not involved in this case, as it was admitted that the Crespo government was finally successful; that it became and now is the legitimate government of the Republic of Venezuela, and was recognized as such by the United States before the commencement of this action.

This Court has also passed upon this question in the case of Ford *v.* Surget, *supra*. There the defendant was an officer of an army of an unsuccessful party which had never been recognized by this Union as being an independent nation or otherwise than as rebels against the parent government. This Court held that the officers of such an army were entitled to the same immunity in civil actions as the officers, and that the Confederate Government was a *de facto* government within the meaning of such term as used by writers on international law. See also Coleman *v.* Tenessee, *supra*.

This Court has also passed upon the status of a revolutionary party which has been finally successful, in Williams *v.* Bruffy, 96 U. S., 185.

"The validity of its acts, both against the present State and the citizens, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts, *from the commencement of its existence*, are upheld as those of an independent nation. Such was the case of the State Governments under the old confederation on their separation from the British crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged.

Confiscations, therefore, of enemy's property made by them were sustained as if made by an independent nation."

By the success of the Crespo party, its acts from the time of the initiation of the hostilities against the Palacio party became valid *ab initio*. Thus its success made it the legally constituted government of Venezuela during the time the petitioner claims he was imprisoned. No action can be maintained on the ground that the Crespo party improperly secured control. It is for the people of Venezuela to determine for themselves who shall control their government, and not for the courts of a foreign country, as stated in Hatch and Baez, 7 Hun (N. Y.), 596: "The courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its territory."

In support of his position, that as to the effect of the success of a revolution, there is a conflict of opinion between different Circuit Courts of Appeal, the attorney for the petition cites:

The Itata, 56 Fed. Rep., 505;
U. S. v. *Trumbull*, 48 Fed. Rep., 99;
The Ambrose Light, 25 Fed. Rep., 408;

In none of these cases was the question in this case involved. Only one of these cases was in the Circuit Court of Appeals, the *Itata*. All these cases turned upon a statute and involved the question whether the neutrality laws of the United States had been violated, and in each of these cases the Court held that the evidence did not warrant the Court in holding that the statute, Rev. Stat. §5283, had been violated. In the *Itata* case the counsel devoted some time to the discussion of the effect of a recognition of a revolutionary party, but Judge Hawley in the opinion of the Court says: "Having reached the conclusion that the evidence in this case is not sufficient to justify a decree of forfeiture against the *Itata*, it is unnecessary to discuss the effect of the subsequent recognition by the United States of the provisional

government of Venezuela as the lawful government of Chili, and upon that question we express no opinion."

It is not necessary here to argue that results of grave moment might follow the adoption of a contrary rule to that which has heretofore been followed by the Courts of this country, both Federal and State. It happens that we are dealing with a younger member of the family of American States, one, too, which might not be able successfully to resent a wrong inflicted by one of the great nations of the world. The learned counsel for the plaintiff in error is quite conscious of this, and indulges in a form of rhetorical appeal, which would probably not be used if the Republic of Venezuela had been more formidable in territory and in numbers than it actually is; but he can hardly have expected, even when disturbed by the misleading influences of extraordinary professional zeal—to deflect the judgment of this Court from the solemn exercise of its great functions. A suggestion that the Republics of South America are to receive different treatment from the leading Governments of the world, because in the counsel's judgment they may be only uncivilized or half civilized nations, does not of course deserve serious consideration, any more than the singular plea that being a Christian nation we must extend a different rule to South American "adventurers," from that which would justly apply to successful military men who in the Counsel's opinion may not be open to that disparaging epithet. Even "Russian usurpers" find no mercy in his indiscriminating eloquence, and our nation must, in order to preserve its high character for Christian excellence, pass upon the validity of the usurper's title, and punish his agents for accomplishing the nefarious purposes of their Master (page 7 of brief of Plaintiff's Counsel). And yet the learned counsel had before him when he thus declaimed, the instructive language of this Court:

"Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdic-

tion, they they would always be supplied in every variety of form. An inhabitant of a bombarded city would have little hesitation in declaring the bombardment unnecessary and cruel."

(Dow *v.* Johnson, *supra*, p. 165.)

This case was correctly decided by the Circuit Court of Appeals following the decisions of this Court. All the questions involved having been disposed of by the decisions of this Court cited above, the petition for a writ of certiorari should be denied.

F. R. COUDERT,
JOSEPH KLING,
Of Counsel.

GEORGE F. UNDERHILL,
Plaintiff in Error,

vs.

JOSÉ MANUEL HERNANDEZ,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FREDERIC R. COUDERT, Jr.,
Of Counsel.

NEW YORK:
THE EVENING POST JOB PRINTING HOUSE, 156 FULTON STREET.
(EVENING POST BUILDING.)
1897.

Supreme Court of the United States

GEORGE F. UNDERHILL,
Plaintiff in Error,

AGAINST

JOSE MANUEL HERNANDEZ,
Defendant in Error.

Brief on Behalf of Defendant.

Statement.

Plaintiff sought in the Supreme Court of the State of New York to recover damages against defendant for alleged false imprisonment and technical assault, charged to have been committed at the city of Bolivar, in the Republic of Venezuela. The action was removed to the United States Circuit Court.

When it appeared on the trial that the acts complained of had been done by order of the defendant while he was in command of an army in military occupation of the city of Bolivar, in the course of a revolution in Venezuela, the court ordered a verdict for defendant.

On appeal to the Circuit Court of Appeals the judgment entered on the verdict was affirmed.

The grounds for the ruling of the trial court and for the affirmance of the judgment are very clearly stated in the direction of the Circuit Judge at folio 134, and in the Opinion of the Circuit Court of Appeals at folio 148.

Facts.

It appeared from the evidence introduced by the plaintiff that a revolutionary movement throughout the State of Venezuela began in the spring of 1892; the subject of the conflict was the legal incumbency of the Presidency of the Republic, Mr. Palacio holding on to the Presidency after the expiration of his term of office, and the insurgents, or 'Legalists' as they were called, resisting this attempt.

> "General Crespo was the revolutionary or "opposition party against the then present "government" (fol. 66).
>
> "There were two parties to this revolution— "the Palacio people and the Crespo people, "as far as I know. * * * One party was "the Palacio party * * * and the other, "the Crespo party, of which General Hernan- "dez was one. * * * I believe the fight "was between the government and Crespo "really. Crespo was finally recognized by the "United States as representing the authority "in October; the revolution had lasted way "back from the summer. I do not know the "ground of the revolution and why General "Hernandez, Crespo and the others called "themselves 'Legalists' or representatives "of the law" (fol. 84).
>
> "Crespo and Hernandez with him were the "rebels (fol. 86).
>
> "They told me that Congress was against "Palacio. Congress can put any man there "(fol. 87)."

It further appeared that in the course of this revolution General Carrera went out from Bolivar with troops against Hernandez; a battle was fought at Buena Vista, seven or eight miles from Bolivar. This was on the 10th of August (fols. 67 and 108).

On the 13th of August, Hernandez came into Bolivar "at the head of the army." The army was uniformed, especially by white muslin bands on their hats with the words "El Legalista" (fols. 71, 73, 115 and 120). From that time Hernandez was in complete control of the city, and, to use the plaintiff's expression, "He was the Great Mogul" (fol. 72).

Authority had been organized, called the provisional government, and made up of Hernandez's officers. Hernandez assumed command and all government authority; he was the only constituted authority in the place (fol. 89).

He was the only man in town in power (fol. 93).

> "He was the only authority in Bolivar. * * "The prefect ran away. * * The Custom "House had run away. I suppose the judges "had all taken flight, etc. (fol. 96)."

He was addressed as "Civil and Military Chief." His letters were so stamped (fols. 78-92, 106-107).

It was to him that plaintiff applied for a passport, which he had power to give (fols. 98, 115). All the officials had escaped; there was no authority left--"chaos and anarchy." Hernandez was the only person from whom plaintiff expected to get redress for wrong (fol. 84).

Hernandez appointed judges (fols. 100 and 112). He appointed the Prefect of the town (fol. 116). He "appointed everything—the President of the city, the local government" (fol. 106); he prescribed general rules refusing access to the town after eight P. M. (fol. 125), and was appealed to for protection and safe conduct even by the captain of a British vessel in the port (fol. 128).

The revolution succeeded, and Crespo entered Caracas on the 6th of October, 1892 (fol. 66). His

Government was formally recognized on the 23d day of October, 1892 (fol. 61; Foreign Relations, 1892, 631-636).

Under the circumstances, and possessing this complete and unquestioned *de facto* authority, Hernandez exercised this authority over the defendant, a permanent resident of the city of Bolivar, and the builder and operator of its waterworks (fol. 61). He feared that the operation of the waterworks would be discontinued and exacted bail of the plaintiff before granting him a passport to leave the city (fols. 75 to 78, 97-98). Plaintiff had written to Hernandez as "Civil and Military Chief," that he would never run the aqueduct for the city of Bolivar again (fols. 91, 92 and 93). Plaintiff complains of his detention in the house he occupied, and yet he testifies that Hernandez wanted the house for his troops; it belonged to the municipality (fol. 82), and Hernandez asked him to vacate it, which he refused to do. He adds:

> "He was the Grand Mogul. *Had the power*
> "*to put me out by force of arms.* He could
> "not get in—not unless they went over the
> "fence. We would have stayed there. *If he*
> "*got me out of that house he would have had*
> "*to put me out by force.* He did not put me
> "out. He made several demands. * * He
> "sent to implore me to let him have the house.
> "I told him no (fol. 109)."

Hernandez required a mule for his military purposes, and yet he "*entreated*" for it and was refused, and only after several attempts, took it for two days and returned it (fols. 116-117).

All the testimony shows unusual consideration on the part of Hernandez, who was confessedly in the exercise of the unlimited power of a commander in control of a conquered town.

No shadow of malice was suggested by the testi-

mony; nothing but the prudent caution of a man upon whom circumstances had devolved responsibility for the safety of a city and a population placed under his care by the chances of war.

Points.

The propositions upon which rests the soundness of the judgment now under review and which defendant in error is prepared to maintain, are:

I.—The jurisdiction of the court below, and the liability of the defendant in the present action, depend upon international law.

II.—International law protects from inquiry in the courts of a foreign jurisdiction acts of a government done within its own territory.

III.—This exemption from review by municipal courts extends to all governmental authority, *de facto* as well as *de jure*, and to its agents, whether civil officers or military commanders.

IV.—The facts in the present case establish beyond question that the defendant was a military commander, a *de facto* authority, and that all the acts complained of were done in that capacity.

I.

The Jurisdiction of the Court below, and the Liability of the Defendant, depend upon International Law.

This has been not only admitted, but claimed by the plaintiff in error. He has insisted, and correctly, that the municipal law of Venezuela affords redress for assaults, &c., and farther that international law is by the Venezuelan Constitution made a part of its municipal law.

He further insists that under international law the defendant would be held guilty of tortious acts against the plaintiff, and as tort follows the person, the tort feasor may, under the sanction of international law, be brought under the jurisdiction of the municipal courts of New York whenever found within its territory, and under that law be held in damages.

It may therefore be assumed that international law is of universal obligation (The *Scotia*, 14 Wall., 170); that it is part of the law of the land where any question arises which is properly the subject of its jurisdiction (Blackstone, Book IV., chap. 4), and that it is the only law which can be applied to foreigners with reference to acts done without the realm (Le Louis, 2 Dod's. Adm., 239).

II.

International Law protects from Inquiry in the Courts of a Foreign Jurisdiction Acts of a Government done within its own Territory.

"The courts of one country are bound to abstain

" from sitting in judgment on the acts of another " government, done within its own territory."

Hatch vs. *Baez*, 7 Hun, 596.

A vessel having been seized under a decree of the French Government which admittedly violated the rights of neutrals, was libelled by the original owners at the port of Philadelphia. Mr. Dallas, then U. S. attorney resisted the libel saying:

> " We do not justify the decree, but we say " that whatever is done by a sovereign in his " sovereign character, it becomes a matter of " negotiation, or of reprisals, or of war, accord- " ing to its importance."

The Supreme Court dismissed the libel on the ground that the vessel was at the time, " a public vessel belonging to a sovereign, and employed in the public service."

The Exchange, 7 Cranch., 116.

This refusal to take jurisdiction of such cases is " a consequence of the absolute independence " of every sovereign authority, and of the in- " ternational comity which induces every sov- " ereign State to respect the independence of " every other sovereign State."

Mighell vs. *Sultan of Jahore*, 63 L. J. R., N. S. (Part II), 593.

See also

DeHaber vs. *Queen of Portugal*, L. R., 20; Q. B., 488.

Varasseur vs. *Krupp*, L. R., Ch. Div., 35.

Westlake Priv. Int. Law, § 190, p. 226 (3d Ed.).

The doctrine has been carried to the exemption

from seizure of a Belgian vessel belonging to the Government and carrying the mails, although she also carried passengers and merchandize for pay.

Le Parlement Belge, 5 P. D., 197.
Briggs vs. *Lightboats*, 11 Allen, 157.
In re Mehemet Ali, Calvo Droit Intl. III., 289.

"If it is a sovereign act, then whether it be ac-
"cording to law, or not according to law, we can-
"not inquire into it."

Duke of Brunswick vs. *King of Han over*, 2 H. L. Cases, 1-16-21.

III.

This Exemption from Review by Municipal Courts extends to all governmental Authority, de facto as well as de jure, and to its Agents, whether Civil Officers or Military Commanders.

A.—"The immunity of individuals from suits
"brought in foreign tribunals for acts done
"within their own States, in the exercise of the
"sovereignty thereof, is essential to preserve the
"peace and harmony of nations."

Hatch vs. *Baez*, *supra*.

Hence the exemption must of necessity apply to all "political authority, whether vested in a single individual or in a number of individuals," for, as Halleck observes, such political authority "is properly the sovereignty of the State."

Halleck Int. Law, pp. 63-64.

It applies to a person acting under a commission from authority.

> Lee, Atty. Gen'l *in re Sinclair*, 1 Op. Atty. Gen'l, 81.

> "The extent of his authority can with pro-
> "priety or convenience be determined only by
> "the constituted authorities of his own nation."

> Bradford, Atty. Gen'l, *in re Collet*, 1 Op. Atty. Gen'l, 45-46.

This follows from the admitted fact that every independent State may adopt whatever political institutions and whatever rules it may please without the interference of any foreign power (Phillimore, Int. Law, p 216).

The immunity springs from the capacity in which the act is performed (Hatch *vs.* Baez; Duke of Brunswick *vs.* King of Hanover, *supra*), and it extends to any public act of persons in a foreign service.

In the *Case of McLeod*, Webster's Works, V., 129, the right was claimed by the courts of the State of New York to put McLeod on trial for murder, on account of an act performed while a member of the British forces in Canada, and the danger that the assertion of such a right might at any time precipitate the nation into an international conflict unless the Federal authorities could set it at naught, procured the enactment by Congress of the statute (*Rev. Stat.* § 753), providing for a writ of *habeas corpus* from the Federal courts on behalf of any foreign subject or citizen in custody for an act done

> "under any alleged right, title, authority

"* * * claimed under the commission, or "order, or *sanction* of any foreign State, or "*under color thereof*, the validity and effect "whereof depends upon the law of nations."

The principle of the exemption could not be more completely nor more tersely stated than in the language of this statute, nor could it more plainly embrace the case at bar.

B.—The immunity extends to *de facto* authorities, and to military rule.

A place captured by the enemy and remaining in his possession, under the command and control of his military forces, enables the enemy "to exercise *the fullest rights of sovereignty* over that place." By the surrender the inhabitants pass under a temporary allegiance to the conqueror and are bound by such laws—and such laws only—as he chooses to impose on them.

"No other laws could be obligatory upon "them, for where there is no protection or al- "legiance or sovereignty, there can be no claim "to obedience" (4 Wheat., p. 254).

Applying this principle to the temporary occupation of the port of Castine in Maine by the British forces during the war of 1812, this Court refused to sanction the collection of custom duties on goods imported into Castine during such temporary military occupation.

U. S. vs. *Rice*, 4 Wheat., 247.

The same principle was again asserted by this Court with reference to the temporary occupation of Tampico by American troops in the Mexican war.

"When Tampico had been captured and the "State of Tamaulipas subjected, other nations

"were bound to regard the country while our "possession continued as the territory of the "United States and to respect it as such. For "by the laws and usages of nations, conquest "is a valid title while the victor maintains the "exclusive possession of the conquered coun- "try."

Fleming vs. *Page*, 9 How., 615.

See also

Cross vs. *Harrison*, 16 How., 164, 190.

"The conquering power has a right to dis- "place the pre-existing authority and to as- "sume to such extent as it may deem proper "the exercise by itself of all the powers and "functions of government. It may appoint all "the necessary officers and clothe them with "designated powers, larger or smaller, accord- "ing to its pleasure. It may prescribe the "revenues to be paid, and apply them to its "own use or otherwise. It may do anything "necessary to strengthen itself and weaken "the enemy. There is no limit to the powers "that may be exerted in such cases, save "those which are found in the laws and usages "of war."

New Orleans vs. *Steamship Co.*, 20 Wall., 394.

These are the attributes of *sovereignty;* no less complete and no less entitled to respect by other nations because they are *de facto* and not titular; because they are transitory and have no duration beyond the period of military occupation.

These were the powers exercised by General Hernandez during his occupation of Bolivar from the 10th of August, 1892, to the successful termination of Crespo's revolt against the usurpation of Palacio, and the extent of his authority as well as the necessity for its exercise should properly be determined by his superiors in his own nation.

The doctrine set forth in *U. S.* vs. *Rice* and *Fleming* vs. *Page*, *supra*, was again laid down by this Court, and applied to the authority of the Confederate States:

> "From a very early period of the Civil War "to its close it was regarded as simply *the* "*military representative* of the insurrection "against the authority of the United "States" (9).

This class of government, the Court continues, is:—

> "Called by publicists a government *de facto*, "but which might perhaps be more aptly de- "nominated *a government of paramount* "*force*. Its distinguishing characteristics are "(1) That its existence is maintained by "active military power, within the territories "and against the rightful authority of an "established and lawful government; and (2) "that while it exists it must necessarily be "obeyed, &c. * * * They are usually ad- "ministered directly by military authority."

After citing the examples of the military occupation of Castine and Tampico, the Court says:

> "We think that it must be classed among "the governments of which these are ex- "amples." * * *
>
> "To the extent, then, of *actual supreme-* "*acy, however unlawfully gained*, in all "matters of government *within its military* "*lines*, the power of the insurgent govern- "ment cannot be questioned."
>
> *Thorington* vs. *Smith*, 8 Wall., 9–10–11.

To the same effect as to belligerency being accorded to the Confederate Government only in its *military character*, and yet that such

> "concession placed its soldiers and military

> " officers in its service on the footing of those
> " engaged in lawful war, and exempted them
> " from liability for acts of legitimate war-
> " fare."
>
> *Williams* vs. *Bruffy*, 96 U. S., 187.

The same ruling and the same distinction as to the belligerency accorded to the "Confederate Army" and exemption from liability for all acts of legitimate warfare, while repudiating all "legislation" of the Confederacy as an unrecognized and unsuccessful rebellion, are again laid down in

Ford vs. *Surget*, 97 U. S., 604-605.

C.—That military commanders, even those acting under such a modified *de facto* government as that of the Confederacy, are exempt, under the principle stated, from inquiry into their acts by the municipal courts, has been thoroughly established by this Court.

Where a Confederate soldier was sued in the courts of West Virginia in trespass for the taking and conversion of plaintiff's cattle, and it appeared that he was a Confederate soldier and seized the cattle under the order of his commanding general, this Court sustained a judgment exonerating him from liability, and said:

> " It is not here denied that the doctrine of
> " *Dow* vs. *Johnson* is correct and that parties
> " are protected by that doctrine from civil
> " liability for any act done in the prosecution
> " of a civil war."
>
> *Freeland* vs. *Williams*, 131 U. S., p. 417.

The doctrine of Dow vs. Johnson thus affirmed, and applied to the protection of members of the Confederate forces, is that an officer serving in an

enemy's country is not liable to an action in the courts of that country for injuries resulting from acts ordered by him in his military capacity "*upon an allegation of the injured party that the acts were not justified by the necessities of war*" (p. 163). It was also there held that :

> "This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army when in Pennsylvania as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether these acts resulted in the destruction of property or the destruction of life ; *nor could they be required by these tribunals to explain or justify their conduct* upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war."
>
> *Dow* vs. *Johnson*, 100 U. S., 158, at page 169.

This doctrine, now so firmly established that not only need no further authorities be cited in its support, but apology may be in order for the copious citations already made, is founded in reason and based on the necessities of military exigency.

It is manifest that to require officers and soldiers to hold themselves in readiness to obey the summons of every local tribunal, and to make them amenable to all the judgments, pains and penalties with which such tribunal might visit them whenever dissatisfied with their explanations of their conduct, or in disagreement with them as to the exigencies of the occasion, would utterly destroy the efficiency of any army as a hostile force (Ford *vs.* Surget, 100 U. S., p. 165).

Hence military commanders must be allowed to govern by military law; and what is military law ?

"Martial law has been defined to be the will "of the commanding officer of an armed force, "or of a geographical military department, ex- "pressed in time of war within the limit of his "military jurisdiction, as necessity demands "and prudence dictates, restrained or enlarged "by the orders of its military chief or supreme "executive ruler.....Martial law is founded "on paramount necessity. It is the will of the "commander of the forces. In the proper "sense, it is not law at all. It is merely a ces- "sation, from necessity, of all municipal law, "and what necessity requires it justifies.

Wheaton Int. Law, p. 470 (3d Eng. Ed).

"It overrules, suspends and replaces the "civil law and civil tribunals. It is from its "very nature an arbitrary power and extends "to all inhabitants of the district where it is "in force."

Halleck Int. Law, p. 373 (Ed. 1861).

"It suspends, for the time being, *all the "laws of the land*, and substitutes in their "place *no law*, that is the mere will of the "military commander."

Cushing, Atty. Genl., 8 Op, Atty. Genl., 365.

"A general principle of military law is that "no acts of military officers or tribunals, "within the scope of their jurisdiction, can "be revised, set aside, or punished, civilly or "criminally, by a court of common law. "Another principle of law is that offenses "committed by persons in the military ser- "vice during the time of war, insurrection "or rebellion, are punishable only by military "tribunals."

In re Ezeta, 62 Fed. Rep., 1003.

Review of Plaintiff's Authorities.

A brief review of plaintiff's positions and the authorities cited may here be in order, before closing the presentation of defendant's case.

(1.) To support his contention that military officers are amenable to civil suits for their actions in war he cites:

Luther vs. *Borden*, 7 How., 45, the only question decided in this case was that no courts had jurisdiction to determine which of two organizations constituted the lawful government of a State; that such a determination was political and was properly the function of Congress or the Executive, whose decision on the subject the courts must follow. Hence, the court below having refused to receive evidence offered by plaintiff to show that defendants, who had caused his arrest under color of authority from a State government, did not represent the only constituted government, the ruling was sustained and judgment directing a verdict was affirmed.

Mitchell vs. *Harmony*, 13 How., 115, plaintiff was trading under protection of the flag, under sanction of the commander, and by permission of the Government.

He was not, therefore, in illicit trade with the enemy, and the officer had no right to seize the property for an act duly authorized by the competent authorities.

Raymond vs. *Thomas*, 91 U. S., 712, simply held that General Canby had no right by a military order to annul a decree of a court of competent jurisdiction. No question of his liability arose. In Ford *vs.* Surget the court held that the act ordering the burning of cotton could have

no force as legislation, but that the orders under which the officers burnt the cotton, as an act of war exempted from all liability those who executed them (97 U. S., 59, 14).

Planters' Bank vs. *Union Bank*, 83 U. S., 483, to same effect.

Ex parte Milligan, 71 U. S., 2; *Smith* vs. *Shaw*, 12 Johns., 257; *McConnell* vs. *Hampton*, 12 Johns., 254, held that civil tribunals being open military arrests were unauthorized and illegal.

But not that the military commanders were liable in damages.

Beckwith vs. *Bean*, 93 U. S., 266, was an action against a Provost Marshal in Vermont. *There was no war in Vermont.* The Supreme Court sustained a denial of a nonsuit because "*there were many disputed facts disconnected from any* question as to the authority derived from the President.

On the other hand, we find in one of these authorities, (Luther *vs.* Borden, *supra*), the following significant language apposite to the present case:

> "It was a state of war: and the established
> "government resorted to the right and usages
> "of war to maintain itself and to overcome
> "the unlawful opposition (2 Black, 697), and
> "in that state of things the officers engaged in
> "its military service might lawfully arrest any
> "one. * * *
>
> "Without the power to do this, martial law
> "and the military array of the government
> "would be mere parade and rather encourage
> "attack than repel it."

(2.) To support his contention that defendant cannot make good his defense that in all the acts complained of he acted in the capacity of a military

commander, because the government or authority in whose behalf he commanded was only recognized by the United States some months after the occurrences complained of, he cites

Kenneth vs. *Chambers*, 14 How., 38.

This was a suit in equity to enforce a contract made by a citizen of the United States to provide arms and ammunition to a resident of Texas, for use against the Republic of Mexico, in the Texas insurrection.

The right to recover was denied on the ground that the contract was *in violation of the laws of the United States, in violation of the treaty with Mexico*, and against public policy. The subsequent success of the Texan insurrection and the incorporation of Texas into the Union did not alter or in any way affect the fact that the contract when made was void and no rights could be predicated of it.

He cites further the cases of

The Ambrose Light, 25 Fed. Rep., 408.
The Conserva, 38 Fed. Rep., 431.
The Itata, 56 Fed. Rep., 505.
U. S. vs. *Trumbull*, 48 Fed. Rep., 99.

In the first of these cases a vessel commissioned by Colombian revolutionists was seized by one of our naval squadron for not having a proper commission and libelled for condemnation under the law of nations as prize.

No recognition of belligerency having been accorded the revolutionists: held, they could not grant a commission which foreign nations were bound to recognize; this on the ground that maritime warfare with its incidents of blockade and right of search imposes burdens and restrictions

upon other nations, and the right to wage it is therefore restricted by international law to recognized sovereignties in the family of nations and denied to revolutionary *de facto* powers, yet unrecognized as belligerents. It is, therefore, the right of other nations, under international law to protect themselves against the burdens of maritime warfare so waged and to treat its participants as pirates.

It was also held, that in the absence of any commission from recognized belligerents the vessel was lawful prize as being engaged on a piratical expedition.

BUT HELD FURTHER, that by a communication from the Department of State on the day of the seizure, our Government having refused to recognize a decree of blockade by the Colombian Government or any other than "*an effective blockade*," this was an implied recognition of the existing insurrection as constituting a state of civil war, and assumes that the revolutionists hold those ports as a *de facto power*, and that in respect to such ports the Colombian Government is a *belligerent*. Hence, that the vessels of the revolutionists could not be regarded as piratical, and *condemnation was denied*.

This, also, in face of a communication from the State Department long after the refusal to recognize the blockade (April 24–July 1, 1885), to the effect that

> "a state of war had not, in a formal sense,
> "either before or after April 20, 1885, been
> "recognized by the Government of the United
> "States as existing in the United States of Co-
> "lombia; nor have the insurgents now in arms
> "against the latter government been recog-
> "nized by the United States as belligerents,
> "nor, so far as advised, by the United States
> "of Colombia."

The communication of April 24, 1885, declared that

> "Vessels manned by parties in arms against
> "the government, when passing to and from
> "ports held by such insurgents, or even when
> "attacking ports in possession of the Colom-
> "bian Government, are not pirates by the law
> "of nations, and cannot be regarded as pirates
> "by the United States."

The Conserva, 38 Fed. Rep., 431, was simply to the effect that no prosecution under the neutrality laws could be sustained for the sending of arms, etc., to either of two Haytien revolutionary factions, neither of which had been recognized as governments or belligerents by the United States Government.

U. S. vs. *Trumbull*, 48 Fed. Rep., 99, arose out of the furnishing of arms and ammunition to the *Itata*, fitted out by the "Congressional Party," revolutionists against the Government of Chili, in 1891.

The only question decided was that the furnishing of arms did not contravene the statute of the United States against fitting out expeditions, etc.

At pp. 104–105 the Court cites Secretary Fish's despatch concerning vessels in the service of the Haytien insurgents (1869) to the same effect as the remarks (*supra*) *in re Ambrose Light*, *i. e.*, the Government of Hayti may regard the insurgents as pirates.

> "How they are to be regarded by their own
> "legitimate Government is a question of munici-
> "pal law, into which we have no occasion, if we
> "had the right, to enter.
> "Regarding them as simple armed cruisers of
> "the insurgents, not yet acknowledged by this
> "Government to have attained belligerent rights,
> "it is competent for the United States to deny
> "and resist the exercise by those vessels, or any

"other agent of the rebellion, of the privileges "which attend maritime war in respect to our "citizens or their property entitled to their pro- "tection" (3 Whart. Int. Law Dig., 465-466).

The Itata, 56 Fed. Rep., 505, was tried on the same facts as U. S. *vs.* Trumbull, and involves the same points.

By reason of the inconvenience and danger to neutrals attendant upon maritime warfare, in view of the latitude allowed in the capture of enemy's private property on the high seas, the laws of prize are necessarily more strict than the rules relating to the recognition of belligerency on land and within the territory of the combatants.

Prize laws are property laws, of universal recognition, and from the act of capture rights of property flow and title to property is affected.

Rights of captors depend upon the status at the moment of capture and that status depends upon the degree of sovereignty or national authority required by the prize laws to clothe the hostile vessel with immunity.

The cases cited by the plaintiff are governed by the usual rules applicable to contracts, the validity of which is always to be tested by the law in force at the time of their execution, or by the rules applicable to cases of maritime warfare by which all nations are exposed to loss and injury.

We believe that an examination of them must dispose of the claim that military commanders are liable for acts done within the territory subject to their command until recognition of their belligerency or nationality by some foreign government, but it may yet be permissible to add a few affirmative authorities on the proposition that subsequent ratification, success and recognition cover revolutionary acts previously done.

The sovereign may ratify hostile proceedings of

a subject, the capture of property, &c., and thus by a retroactive operation give validity to them.

Brown vs. *U. S.*, 8 Cr., 131-32-33.
(Cited in *Prize Cases*, 2 Black, p. 671.)

"The objection to this act of ratification that "it is *ex post facto*, and therefore unconstitu- "tional and void, might possibly have some "weight on the trial of an indictment in a "criminal Court. But precedents from that "source cannot be received as authoritative "in a tribunal administering public and inter- "national law."

Prize Cases, 671.

"Changes attempted by small or doubtful "majorities, it must be conceded, will be "at their peril, as they will usually be resisted "by those in power by means of prosecutions "and sometimes by violence, and, *unless "crowned by success*, and *thus subsequently "ratified*, they will often be punished as re- "bellious or treasonable."

Luther vs. *Borden*, 7 How., 56 (Dissenting Opinion).

"The other kind of *de facto* government "to which the doctrines cited relate, is such as "exists where a portion of the inhabitants of "a country have separated themselves from "the parent State and established an inde- "pendent government. * * *

"*If it succeed and become recognized, its "acts from the commencement of its existence* "are upheld as those of an *independent "nation.*

Williams vs. *Bruffy*, 96 U. S. 186.

"Those who engage in rebellion must con- "sider the consequences. *If they succeed, "rebellion becomes revolution, and the new "government will justify its founders.*"

Shortridge vs. *Mason*, Chase's, Dec., 136

This brings us to the consideration of our last premise, to wit:

IV.

The Facts in the present Case establish beyond question that the Defendant was a Military Commander, a De Facto Authority, and that all the Acts complained of were done in that Capacity.

A reference to the statement of facts (p. 3) borne out by specifications of the evidence on which it is based, must carry the conviction that the case presented by the plaintiff's testimony combined every element of an armed conflict between two contending parties, each having armies in the field under control of commanding officers, exercising all the authority usually conferred upon military leaders. The Palacio commander, General Carrera, in command of the military district of Guayana, with headquarters at the city of Bolivar, goes out at the head of his army to meet General Hernandez in command of forces supporting Crespo's claims, a battle is fought, Carrera is defeated and killed, Hernandez comes into the city at the head of his army, takes and holds possession of the town from that time until the end of the war, governing the town and the district of Guayana with all the undisputed authority of military law, replacing the civil authorities, who had fled and abandoned their posts, prescribing rules and regulations for the government of the town and the port, dispensing and refusing passports and safe conducts, not only to the inhabitants, but to foreigners and captains of foreign vessels.

The only thing wanting in this description of war is the formal declaration of war.

In civil war there is no such declaration. Moreover, a declaration is not a necessary preliminary to any war. Our Mexican war was never declared. It began, and then Congress recognized its existence.

> "War may exist without a declaration on "either side. It is so laid down by the best "writers on the law of nations" (Lord Stowell).
>
> Cited in *Prize Cases*, 2 Black, p. 668.

Of the Dorr Rebellion in Rhode Island, Chief Justice TANEY said:

> "It was a state of war, and the established "government resorted to the rights and usages "of war to maintain itself and overcome the "unlawful opposition."
>
> *Luther* vs. *Borden*, 7 How., 45.

Mr. Justice NELSON, commenting on this expression in the Prize Cases (p. 697) says:

> "The term "war" must necessarily have "been used here by the Chief Justice in its "popular sense, and not as known to the law "of nations, as the State of Rhode Island con- "fessedly possessed no power under the "Federal Constitution to declare war."

What more is needed to demonstrate that every act complained of against General Hernandez was an act of war, done by a military commander, representing the *de facto* authority of his country, sustaining the lawful government of Venezuela, since triumphant, and recognized by the executive and legislative departments of our government?

In this view it is unnecessary to consider the exceptions to the exclusion of evidence taken by the plaintiff, for these facts appearing, the Court could not take cognizance of the case nor assume the

right to weigh every circumstance surrounding the exercise by a foreign authority of the undoubted power conferred upon him.

The trial court properly directed a verdict for the defendant; the Circuit Court of Appeals properly affirmed the judgment entered, and its judgment should in turn be affirmed by this Court.

New York, 15th March, 1897.

FREDERIC R. COUDERT, JR.,
Of Counsel for Defendant in Error.

No. 238. 36

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Brief of Goudert & Kling for

Supreme Court of the United States.

Filed Mar. 22, 1897.

GEORGE F. UNDERHILL,
Plaintiff in Error,

AGAINST

JOSE MANUEL HERNANDEZ,
Defendant in Error.

Brief for Defendant in Error.

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Statement of Facts.

In the early part of the year 1892, a revolution broke out in Venezuela, which lasted until about October 6 of the same year. The principal parties to this conflict were those who recognized Palacio as their chief, and those who followed the leadership of Crespo. General Hernandez, the defendant in error, was one of the principal officers in the army under General Crespo, and commanded the District of Guayana, in which the City of Bolivar is situated. The party headed by Crespo was finally successful and entered the City of Carraccas on October 6, 1892 (fol. 66). The Crespo Government, so-called, was formally recognized as the legitimate Government of Venezuela by the United States on October 26, 1892, and was at the time of the trial of this action the recognized government of that country (fol. 61). It had been recognized as the legitimate Venezuelan Government by other foreign powers before that time.

In August, 1892, General Hernandez was in command of an army composed of the adherents of Crespo; his troops were encamped near the City of Bolivar.

Some time previous to this, an army under General Santos de Carrera composed of the adherents of Palacio was sent out against General Hernandez. A battle between the two armies took place at Buena Vista on August 8, 1892. Buena Vista is about seven miles from Bolivar. On August 13, General Hernandez entered Bolivar at the head of his troops, and at once assumed command of the city and surrounding district. Between the date of the battle of Buena Vista and General Hernandez' entry into Bolivar, all the officials of the city left the country, and the vacant positions were filled by General Hernandez (fols. 96, 106). There is no evidence of any conflict after this occupation of the city, nor any evidence that the appointees of General Hernandez are not still holding their offices.

The plaintiff in error, Underhill, was during all this time a resident of Bolivar. Some time after the entry of General Hernandez, Underhill *applied to him as the officer in command for a passport to leave the city* (fol. 84). General Hernandez refused this request, and also repeated requests made by others in his behalf, until October 18, when a passport was given and the defendant left the country. This action is brought to recover damages for the detention caused by reason of the refusal to grant this passport, for an alleged confinement of the plaintiff in error in his own house and for certain alleged assaults and affronts by the soldiers of his army.

On the trial of the action at Circuit, the jury were at the close of the plaintiff's case, directed to find a verdict in favor of the defendant, upon which judgment was entered, which was affirmed by the United States Circuit Court of Appeals (fol. 148).

BRIEF AS TO FACTS.

There is no evidence that the defendant imprisoned or caused the plaintiff to be imprisoned in his house.

The house in which the defendant resided *belonged to the municipality* (fol 81). So far from keeping or desiring to keep the plaintiff imprisoned and to prevent his leaving the house, *it is proved that defendant was desirous of having the defendant leave it*, and sought to induce him to give up possession of the property which he needed for his troops.

But the plaintiff *refused to surrender possession* of the house, although defendant made repeated demands for its possession. The plaintiff's position as to what he calls false imprisonment may be best described in his own language:

"I said something yesterday about General Her-
" nandez asking me to vacate the house and my re-
" fusal. I think it was about the 21st of August. I
" did not go, because I did not consider, in the first
" place, he had any right to ask that question. *He*
" *demanded the house for his troops*—for his Winches-
" ter men. He was the Grand Mogul. Had the power to
" put me out by force of arms. He could not get in
" not unless they went over the fence. We would
" have stayed there. If he got me out of that house he
" would have had to put me out by force. He did not
" put me out. He made several demands. After
" that he sent a man who had furnished me wood for
" two or three years—was one of his generals. *He*
" *sent him to implore me to let him have the house. I*
" *told him no*, not unless they put the things in the
" street. I call imprisonment putting soldiers around
" my door, not allowing me to go out of my house.
" That is what I call imprisonment" (fols. 109, 110).

The plaintiff shows but one technical assault, and that is described at folio 74. It was simply that on August 15 he was going out of his gate to purchase

some grass, when some soldiers who had been sitting about the square in front of the house told him he must go back, and that it was the orders of the "muncho," by which the plaintiff thought they meant General Hernandez. There is, however, no evidence to show that this matter was ever brought to the attention of the defendant, although the plaintiff had after that sent several of his friends to demand a passport for him, and both he and Mrs. Underhill had personal interviews with him. The plaintiff himself states at folio 90, "he (General Hernandez) never touched me—only his men did, that is all. They handled me pretty roughly. I do not believe he instructed his men to strike me. I do not truly think he instructed his men to do that" (fol. 90).

The presence of troops about the house may best be explained by reference to the maps and photographs before the Court and to the plaintiff's testimony at fols. 81, 82, that about the square in front of plaintiff's house there were several barracks, the commandant's house, infantry barracks, &c.

That the defendant placed cannon in front of a house which he desired the plaintiff to vacate for the purpose of imprisoning him there, is a proposition so absurd that it does not deserve further consideration. Indeed it was not pressed by the plaintiff.

It must be very plain that the plaintiff was treated with singular forbearance by the defendant when we consider the conceded facts. The house belonged to the municipality and plaintiff was to occupy it so long only as he carried on the water works. He had decided to give up running these works, and yet when the house was demanded of him he refused to vacate it, and although the defendant might have removed him by force, he permitted him to occupy it during the whole term of his so-called imprisonment.

The defendant was a general in command of an army of a government recognized as the legitimate government of Venezuela by the governments of the United States and of foreign governments.

The plaintiff admits that General Hernandez was at the head of an army, and that General Santos Carera went out with troops against him (fols. 48, 96, 97, 265). That there was a conflict between the two armies, and that in the conflict General Hernandez' army was successful, and General Carrera killed (fol. 96). The defendant entered the City at the head of an army (fol. 89), and, to use the plaintiff's language, he was the Great Mogul at the time (fol. 93). In all his subsequent interviews the plaintiff assumes that the defendant was the general in command, he so addresses him in the letter of September 24 (fol. 91), and he and his friends apply to him as an officer in authority who had the right to grant and refuse passports. And at folio 89 he says: "When General Hernandez came in, he assumed command. He assumed all the government authority therein. *As far as I know he was the only constituted authority in the place.*" There certainly was no other authority, civil or military, within fifty miles of Bolivar besides General Hernandez (fol. 96).

Although it is immaterial whether the defendant was, or was not, what is called a "revolutionary" officer, yet we contend that the evidence fails to show even that he was a so-called successful revolutionary or insurgent general, or other than a general of the regular Venezuelan army. It is true that the plaintiff calls the defendant a rebel at times, and states that he was engaged in a revolution against the government. This, however, is his conclusion on a question of law, and his opinion of what is a rebel and what a revolution is somewhat hazy and indefinite. He is not familiar with the Spanish language, nor with the provisions of the constitution (fol. 95). He does not know the ground of the revolution (fol. 95), and whether Palacio refused to leave office after his term expired, nor whether he was declared a usurper by Congress (fol. 94), nor whether the war was levied by Congress against Palacio (fol. 94). His opinion is that Congress has something to do with the affairs of the country, but the President has more, and that if Con-

gress had levied war against Palacio, and Crespo was acting according to the laws of Congress, he would still call him a rebel.

The President of Venezuela is not an elective officer, but is simply one of the members of the Federal Council which is composed of one senator and one deputy from each of the States constituting the United States of Venezuela, and one deputy at large and elected by Congress; the term of the President and the members of the Federal Council is two years, and neither he nor they can be elected to a second consecutive term (fols. 48–49, Art. 61–62 of the Constitution of Venezuela).

The plaintiff does not enlighten us as to whom the Federal Council of the Venezuelan Congress selected as President in February, 1892. From the fact of Crespo's recognition we think it should be assumed that he was selected as President, and that some other person resisted his lawful claims to hold such office.

General Hernandez must be regarded as the captor of a hostile city during a general war. The revolution so called was not confined to Bolivar, but extended over the whole country (fol. 84). After the battle of Buena Vista all the officials of Bolivar left the City and General Hernandez occupied it though peaceably surrendered to him. The facts are more briefly and tersely stated in the opinion of Judge Wallace at folio 148.

At the close of the plaintiff's case the Court called upon his counsel to define his position. He admitted:

(1). That General Hernandez was in absolute control in Bolivar; though he claimed this control was without right or authority, yet as a matter of fact he had control (fol. 130).

(2). That the defendant was a General, had command of soldiers, fought a battle, had been victorious, and then came into the city and took possession (fol. 130).

(3). Before the defendant entered the City the civil authorities had all gone, and he took control of the City, as a General of soldiers, had an army of some size under his command, and had possession in that way (fol. 131).

BRIEF AS TO THE LAW.

POINT I.

The acts which the plaintiff claims constituted his false imprisonment by the defendant, having been done by him in his capacity of a military commander their validity cannot be questioned in the courts of another country.

The contest in Venezuela was a contest by the legitimate government to maintain its supremacy. It succeeded in this. Whatever was done by General Hernandez was done in his capacity as an officer of the government, and the plaintiff claims that the defendant is liable because the Crespo government was in the wrong; that the adherents of Crespo were rebels and overturned the legitimate government. There is no question made that the successful party to such contest was the Crespo party; that such party was in power up to the time of the trial of this action and had been recognized as the legitimate government of Venezuela by the United States. It being established that the superiors of the defendant constituted the legitimate government of Venezuela, the means by which this end was accomplished are immaterial and are not the subject of inquiry by the Courts of a foreign country. If the people of Venezuela choose to recognize Crespo as their President, the Courts of a foreign country cannot investigate the methods by which he acquired power.

It is well established that a sovereign is exempt from liability in the Courts of law of another country for acts done within his territory. This immunity is not limited by the character of the act done, as claimed by the counsel for the defendant in error, but applies to all acts done by the sovereign in his territory. The principle may be broadly stated that no foreign State or sovereign can be made responsible in the Courts of a foreign country for any act done within its own territory. Any redress for such acts must be sought for by appeal to the government of the injured citizen, and must be sought through diplomatic channels and not by means of a lawsuit.

One of the earliest cases in this Court, in which this principle was involved, is *The Exchange*, 7 Cranch, 112. In this case it appeared that the vessel in question was formerly an American vessel and belonged to the libellants. It was wrongfully seized by certain French officers, and afterward, while flying the French flag and under the command of French officers, put into the port of Philadelphia under stress of weather. Her former owners libelled her. The District Court held that it had no jnrisdiction and dismissed the libel. This decision was reversed on appeal to the Circuit Court, but this was in turn reversed by this Court.

Chief-Justice MARSHALL, in delivering the opinion of the Court, says · "The sovereign power of the action is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion —are of great weight and merit serious discussion."

The same principle was applied in the case of *L'Invincible*, 1 Wheat., 238, in which case the vessel in question was not seized by the vessels of the foreign sovereign but by private adventurers acting under commission from their sovereign. The Court held that this made no difference that the courts of this country had no jurisdiction *adjudicato* upon the question whether such capture was legal. The Court quotes with approval Vattel's views upon this immunity.

"That it is a consequence of the equality and absolute independence of sovereign states on the one hand and of the duty to observe uniform, impartial neutrality on the other. Under the former every sovereign becomes the acknowledged arbiter of his own justice, and cannot consistently with his own dignity, stoop to appear at the bar of other nations to defend the acts of his commissioned agents, much less the justice and legality of those rules of conduct which he prescribes to them."

The same question arose in the Supreme Court of the State of New York.

Hatch *v.* Baez, 7 Hun, 596.

The defendant at the time of the commission of the acts on which the cause of action was the President of the Dominican Republic and such acts were done by him in his official capacity. At the time of the commencement of the action he had ceased to be President. The Court held that the action could not be maintained; that the Courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory that to make the defendant amenable in our Courts for any act done by him in his official capacity would be a direct assault upon the independence of his own country; that the defendant's immunity had not ceased because his term as President had expired; that such immunity "springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

The authorities in England are to the same effect. The leading case is The Duke of Brunswick *v.* The King of Hanover (2 House of Lords, Cas. 1). The defendant, though the King of a foreign country, was a British subject, and at the time he was sued was exercising his rights as such in England. The House of Lords held, affirming the decision of the Court of Chancery, that although the defendant was a British subject, yet he could not be called to account for acts done abroad by him *whether right or wrong* in his capacity as sovereign. The principles established

by this Court in the above cases are reiterated : that a sovereign cannot be made responsible in the Courts of another country for acts done in his official capacity within his own territory.

The same question has been previously decided in

Nabob of Arcat *v.* The East India Co., 4 B. C. C., 180.

In a recent case in England, the Sultan of Jahore was sued in an action for breach of promise of marriage, which he made in England under his assumed name of Albert Baker. The Court held that the action could not be maintained : the Master of the Rolls, in delivering the opinion of the Court of Appeal, said : "As a consequence of the absolute independence of every sovereign authority and of the international comity, which induced every sovereign state to respect the independence of every other sovereign state, each and every one declined to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign of any other state, though such sovereign were within its territory."

Mighell *v.* Sultan of Jahore, 63 L. R., U. S. Q. B. Div. (Part II.), 593.

POINT II.

This immunity is not confined to the sovereign, but extends to all those in the service of the sovereign or the state where the acts complained of were done by them in the exercise of their public employment, or as an official of such sovereign or state.

This principle was involved in the case of *L'Invincible*, Wheat, 238, *supra*, in which this Court held that this immunity extended to private adventurers at sea when acting under the authority of the sovereign.

The Department of State has often requested the

opinion of the Attorney-General as to whether the Courts of this country could entertain jurisdiction of cases in which the acts done by the defendant were done in his official capacity as an officer of a foreign sovereign or state. The different Attorney-Generals to whom this question was submitted, uniformly advised the Government that such officers could not be held answerable in our tribunals for acts done in their own country in their official capacity.

In 1794, one Collet, not a "sovereign," but then lately French governor at Guadaloupe, a minor administrative official, was arrested in the United States in an action brought against him for the seizure and condemnation of a vessel. The matter having been brought to the attention of the Government of the United States, it was referred to the Attorney-General. The Attorney-General held that there was no ground on which the United States could then intervene, the defendant being subject to process, but he said: "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation."

Bradford, 1 Op., Atty. Gen., 45, 46..

In the case of Henry Sinclair, in 1797, the Attorney-General of the United States, held "that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission to any judiciary tribunal of the United States."

Lee, Atty. Gen., 1 Op., 81.

So strictly is this principle observed that it has been maintained on the highest authority and admitted by

the Government of the United States that an individual forming part of a public force, and acting under authority of his government, cannot be held to answer before the tribunals of a foreign government for an act committed within its jurisdiction, even in time of peace.

In November, 1840, one Alexander McLeod, a British subject was arrested in the State of New York on a charge of murder committed at the destruction of the steamer *Caroline*, in the port of Schlosser, in that state. The *Caroline* was a vessel in the employ of insurgents who were attempting to overthrow the Government of Canada, and the British Government demanded McLeod's release on the ground that the destruction of the steamer was "a public act of persons in Her Majesty's service, obeying the orders of their superior authorities;" that it could therefore "only be the subject of discussion between the two national governments," and could "not justly be made a ground of legal proceedings in the United States against the persons concerned." The courts of New York refused to release McLeod, and he was acquitted on proof of an alibi; but Mr. Webster, as Secretary of State, admitted the validity of the British Government's demand, and in order to reach any similar case that might arise in the future, Congress passed an Act of August 29, 1842 (R. S., Sec. 753), by which the courts of the United States are empowered to issue a writ of *habeas corpus*, where a person, "being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanctions of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."

For a full exposition of Mr. Webster's position, see Webster's works, especially Vol. 5, p. 129.

POINT III.

Where a military force, in the prosecution of a war, gains and holds possession of a part of the territory of a state, such territory is necessarily governed by the person in command of the force having possession, and his government is recognized by public law as a government de facto, to which all the inhabitants of the district owe obedience.

A.—In the case of the *United States* v. *Rice*, 4 Wheaton, 246, an action was brought against the defendant to recover duties on goods imported by him into Castine while it was in the military possession of the British forces in 1814. In delivering the opinion of the Court, Mr. Justice Story said: "By the conquest and *military occupation* of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. * * * By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose" (p. 254).

See also *U. S.* v. *Hayward*, 2 Gallison, 485.

The same principle was enforced by the United States during the war with Mexico.

Fleming v. *Page*, 9 Howard, 603.
Cross v. *Harrison*, 16 *Id.*, 190.

Also during the civil war in the United States.

New Orleans v. *Steamship Co.*, 20 Wallace, 387.

In both these instances—that of the war of 1812 and the war with Mexico—the occupant of the conquered

territory was a recognized government, in one case Great Britain and in the other the United States.

"According to every definition of martial law," said Mr. Cushing, "it suspends for the time being all the laws of the land, and substitutes in their place no law, that is, the mere will of the military commander."

Cushing, Atty. Gen., 8 Op., 365.

"It derives no authority from the civil law (using the term in its more general sense), nor assistance from the civil tribunals, for it overrules, suspends and replaces both. It is from its very nature an arbitrary power, and extends to all inhabitants (whether civil or military) of the district where it is in force. It has been used in all countries and by all governments, and it is necessary to the sovereignty of a state as the power to declare and make war."

Halleck, Int. Law, Ed. 1861, p. 373.

The same writer further observes that it "depends upon the constitution of the state whether restrictions or rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence." *Ibid.*

It is for this reason, as well as because of the governmental character of the act, that a military commander, administering the government of a territory (of which he has the occupation) under martial law, cannot be sued.

B.—This principle has been fully recognized by the United States in respect to the acts of Confederate authorities during our civil war. The Confederacy was never recognized as a government *de facto* in the usual sense. It sent and received no ambassadors. Its acts have been held not to be binding either on the United States or on the States which it represented. It never represented a nation, it never expelled the public authorities from the country, it never entered into any treaties, nor was it ever recognized as a government

by an independent power. Those who suffered by its acts have been without redress. Yet, it has never been supposed that those who administered it could be held liable for their public acts in any judicial tribunal.

The distinction here made has never been more clearly expressed than by the Supreme Court of the United States.

Texas v. *White*, 7 Wallace, 700.
Horn v. *Lockhart*, 17 *Id.*, 570.
Sprott v. *U. S.*, 20 *Id.*, 459.

In the case of *Thorington* v. *Smith*, 8 Wallace, 9, a suit was brought for the enforcement of a contract made in Confederate money.

In defense to the action it was argued that the Confederacy was not a lawful government. In answer to this contention, the Court, CHASE, C. J., said:

"There are several degrees of what is called *de facto* government.

"But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominted a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government, and (2), that while it exists, it must necesssarily be obeyed in civil matters by private citizens, who, by acts of obedience, rendered in submision to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. *Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority*, but they may be administered, also, by civil authority, supported more or less directly by military force."

It was held that the Confederacy was such a government, and the Court declared that its supremacy "*made obedience to its authority, in civil and local*

matters, not only a necessity but a duty. Without such obedience, civil order was impossible."

In the case at bar, this principle applies with greater force because at the time when General Hernandez was administering *de facto* at Bolivar, as Civil and Military Chief of the place, there was no other *de facto* government, in the international sense of the term, in Venezuela. The former titular government had relinquished even the pretense of legal authority over the State of Bolivar, by a decree dated August 26, 1892, well described by Mr. Scruggs, the Minister of the United States as "a mere *brutum fulmen* of an important faction against its rival who is now (September 7), and has been for weeks past, in actual possession of the ports named" (Ciudad, Bolivar and Puerto Cabello), the former titular government had undertaken to close by a paper proclamation ports which it was not in its power either to close up or keep open. There was no ministry. There was no one in Caracas to whom the diplomatic representatives might address themselves, (For. Rel., 1892, p. 631).

On the 18th of October, 1892, the Minister of the United States reported from Caracas that "order and tranquility had been restored in the capital, and apparently in all parts of the Republic." "The revolution has," he continued, "triumphed completely, and Gen. Crespo is now in unopposed possession of the machinery of government, with duly appointed cabinet ministers and public officers. The new cabinet is made up of representative men of character from the several States of the Republic, and seems to give very general satisfaction." (For. Rel., 1892, p. 636.) Eight days previously, on October 10, Mr. Scruggs had telegraphed an inquiry whether he should not recognize without delay and formally the *de facto* government of Gen. Crespo, which held "without opposition the full machinery of government," including a cabinet and public officers, and had "*the purpose and power of executing international obligations.*" (*Id.*, p. 634.) Mr. Scruggs was instructed to recognize

the new government, provided it was "accepted by the people, in the possession of the power of the nation, and fully established." (*Id.*, p. 635.) In a few days Mr. Scruggs fulfilled the formalities of "recognition." (*Id.*)

It is impossible to conceive of a case in which the authority of a *de facto* government, such as that maintained by General Hernandez, could be clearer.

It is to be observed that in this correspondence there was no pretense that the act of recognition on the part of the United States established the government or gave it a legal character. The government was recognized because it was "*accepted by the people, in possession of the power of the nation, and fully established.*"

This act of recognition, however, which was thus accorded, enabled the United States to treat with the new government as the sole government of Venezuela, with power to bind the people by its acts; and it gave notice to the authorities and the people of the United States that the Government of Gen. Crespo was the titular government of Venezuela.

POINT IV.

There is no evidence that the Crespo Government was not the legally constituted government of Venezuela. But even it were a revolutionary government its acts cannot be questioned in the Courts of a foreign jurisdiction.

It is claimed by the plaintiff in error, and much of his argument is devoted to maintaining that the Crespo government was a government of rebels, and that the faction which opposed it really constituted the lawful authority. There is no evidence whatever to sustain this.

The Government of Crespo was at all times the legally constituted Government of Venezuela and all its acts in obtaining possession of the reins of government were valid and cannot be questioned in this action. The people of Venezuela in recognizing the Crespo Government exercised a sovereign and political right for which neither they nor their officers can be called to account by the courts of a friendly power.

The Crespo Government was recognized by this country in 1892, and such government had control at the time of the trial of action. It being the recognized government, an action cannot be maintained in this Court brought upon the assumption that those who secured control did so improperly. It is for the people of Venezuela to determine who shall control their government, and not for the courts of a foreign country. But assuming that the Crespo Government was a revolutionary one, its success makes it *ab initio* the legitimate government. This question was fully considered by the Supreme Court of the United States in Williams *v.* Bruffy, 96 U. S., 185.

> " The other kind of *de facto* governments, to
> " which the doctrines cited relate, is such as
> " exists where a portion of the inhabitants of a
> " country have separated themselves from the
> " parent State and established an independent
> " government. The validity of its acts, both
> " against the parent State and its citizens or
> " subjects, depends entirely upon its ultimate
> " success. If it fail to establish itself perma-
> " nently, all such acts perish with it. If it
> " succeed, and become recognized, its acts,
> " *from the commencement of its existence*, are
> " upheld as those of an independent nation.
> " Such was the case of the State governments
> " under the old confederation on their separa-
> " tion from the British crown. Having made
> " good their declaration of independence, every-
> " thing they did from that date was as valid
> " as if their independence had been at once ac-

"knowledged. Confiscations, therefore, of "enemy's property made by them were sus- "tained as if made by an independent nation."

Same doctrine affirmed and recognized in Ford *v.* Surget, 97 U. S., 594.

POINT V.

An officer of an army, while serving in the enemy's country during war, is not liable to an action for injuries resulting from his military orders or acts.

This proposition is settled in *Dow* v. *Johnson*, 100 U. S., 158.

In that case General Dow, during the war of the Rebellion, ordered the seizure of Johnson's goods while the southern part of Louisiana was in possession of the Union army. General Dow was sued for this alleged trespass in the civil courts of Louisiana. The General made no defense to this suit, and judgment by default was rendered against him. Suit was brought on this judgment in the Courts of Maine. On appeal to the United States Supreme Court it was held that such action could not be maintained.

> An officer of the army of the United States, while serving in the enemy's country during the rebellion, was not liable to an action in the Courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own government.
>
> * * * * * *
>
> "When, therefore, our armies marched into

" the country which acknowledged the authority
" of the Confederate Government, that is, into
" the enemy's country, their officers and soldiers
" were not subject to its laws, nor amenable to
" its tribunals for their acts. They were sub-
" ject only to their own government, and only
" by its laws, administered by its authority,
" could they be called to account. As was ob-
" served in the recent case of Coleman *v.* Ten-
" nessee, it was well settled that a foreign army,
" permitted to march through a friendly
" country, or to be stationed in it by authority
" of its sovereign or government, is exempt
" from its civil and criminal jurisdiction. The
" law was so stated in the celebrated case of
" *The Exchange*, reported in the 7th of Cranch.
" Much more must this exemption prevail
" where a hostile army invades an enemy's
" country. There would be something singu-
" larly absurd in permitting an officer or soldier
" of an invading army to be tried by his enemy,
" whose country it had invaded.

" The same reasons for his exemption from
" criminal prosecution apply to civil proceedings.
" There would be as much incongruity, and as
" little likelihood of freedom from the irritations
" of the war, in civil as in criminal proceedings
" prosecuted during its continuance. In both
" instances, from the very nature of war, the
" tribunals of the enemy must be without juris-
" diction to sit in judgment upon the military
" conduct of the officers and soldiers of the in-
" vading army. It is difficult to reason upon a
" proposition so manifest; its correctness is evi-
" dent upon its bare announcement, and no ad
" ditional force can be given to it by any amount
" of statement as to the proper conduct of
" war. It is manifest that if officers or sol-
" diers of the army could be required to
" leave their posts and troops, upon the
" summons of every local tribunal, on pain of a

" judgment by default against them, which at " the termination of hostilities could be enforced " by suit in their own States, the efficiency of " the army as a hostile force would be utterly " destroyed. Nor can it make any difference " with what denunciatory epithets the complain- " ing party may characterize their conduct If " such epithets could confer jurisdiction, they " would always be supplied in every variety of " form. An inhabitant of a bombarded city " would have little hesitation in declaring the " bombardment unnecessary and cruel. Would " it be pretended that he could call the com- " manding general, who ordered it, before a " local tribunal to show its necessity or be " mulcted in damages. The owner of supplies " seized or property destroyed would have no " difficulty, as human nature is constituted, in " believing and affirming that the seizure and " destruction were wanton and needless. All " this is too plain for discussion and will be " readily admitted.

* * * * * * * *

"If private property there was taken by an offi- " cer or a soldier of the occupying army, acting in " his military character, when, by the laws of " war, or the proclamation of the commanding " general, it should have been exempt from " seizure, the owner could have complained to " that commander, who might have ordered " restitution, or send the offending party before " a military tribunal, as circumstances might " have required, or he could have had recourse to " the government for redress. But there could " be no doubt of the right of the army to ap- " propriate any property there, although be- " longing to private individuals, which was " necessary for its support or convenient for its " use. This was a beligerent right, which was " not extinguished by the occupation of the " country, although the necessity for its exercise

" was thereby lessened. However exempt from
" seizure on other grounds private property
" there may have been, it was always subject
" to be appropriated, when required by the ne-
" cessities or convenience of the army, though
" the owner of property taken in such case may
" have had a just claim against the government
" for indemnity." * * * * *

" This doctrine of non liability to the tribu-
" nals of the invaded country for acts of war-
" fare is as applicable to members of the Con-
" federate army, when in Pennsylvania, as to
" members of the National army when in the
" insurgent States. The officers or soldiers of
" neither army could be called to account civilly
" or criminally in those tribunals for such acts,
" whether those acts resulted in the destruction
" of property or the destruction of life; nor
" could they be required by those tribunals to
" explain or justify their conduct upon any
" averment of the injured party that the acts
" complained of were unauthorized by the neces-
" sities of war."

* * * * * * *

" Nor is the position of the invading beliger-
" ent affected, or his relation to the local tribu-
" nals changed, by his temporary occupation and
" domination of any portion of the enemy's
" country. As a necessary consequence of such
" occupation and domination, the political rela-
" tions of its people to their former government
" are, for the time severed. But for their pro-
" tection and benefit, and the protection and
" benefit of others not in the military service, or,
" in other words, in order that the ordinary pur-
" suits and business of society may not
" be unnecessarily deranged, the muni-
" cipal laws—that is, such as affect
" private rights of persons and property,
" and provide for the punishment of crime - are
" generally allowed to continue in force,

"and to be administered by the ordin-
"ary tribunals as they were administered
"before the occupation. They are consid-
"ered as continuing, unless suspended or super-
"seded by the occupying belligerent. But their
"continued enforcement is not for the protec-
"tion or control of the army, or its officers or
"soldiers. These remain subject to the law of
"war, and are responsible for their conduct only
"to their own government, and the tribunals by
"which those laws are administered. If guilty
"of wanton cruelty to persons, or of unneces-
"sary spoliation of property, or of other acts
"not authorized by the laws of war, they may
"be tried and punished by the military tri-
"bunals. They are amenable to no other tri-
"bunal, except that of public opinion, which, it
"is to be hoped, will always brand with infamy
"all who authorize or sanction acts of cruelty
"and oppression."

This case was approved in Freeland *v.* Williams, 131 U. S., at p. 416.

"Ever since the case of Dow *v.* Johnson, 100 U. S., 158, the doctrine has been settled in the Courts that in our late civil war each party was entitled to the benefit of belligerent rights as in the case of public war, and that for an act done in accordance with the usages of civilized warfare, under and by military authority of either party no civil liability attached to the officers or soldiers who acted under such authority."

Lamar *v.* Browne, 92 U. S., at p. 197.
Coleman *v.* Tennessee, 97 U. S., 509.

Plaintiff's Authorities.

The plaintiff in error fails to cite a single authority which would tend to hold the defendant liable in this action. The defendant, as the commander of a conquered city, ordered that no person should land after 8 o'clock at night (*fol. 125*) and refused to allow the defendant to leave the city. That an officer in command of an army has a right to refuse to allow citizens to go beyond certain lines is beyond question. It is not surprising that the plaintiff can find no authority to support his proposition.

The cases cited by the plaintiff are not in point.

They are all extracts from opinions in cases in which the question at issue in this case was not involved. Where the question in this case was directly involved as in Dow *v.* Johnson and Ford *v.* Surget, the Courts held the defendant not liable.

A reference to the cases cited in plaintiff's brief in the Court below which we assume will be cited by him in his brief to this Court, will demonstrate that the question raised here was not there involved.

Mitchell *v.* Harmony, 13 How., 115.

The opinion shows the nature of the action.

> "There is no dispute about the facts which "relate to this part of the case, nor any con- "tradiction in the testimony. The plain- "tiff entered the hostile country openly for "the purpose of trading, in company with "other traders, and under the protection "of the American flag. The inhabi "tants with whom he traded had sub- "mitted to the American arms, and the country "was in possession of the military authorities of "the United States. The trade in which he "was engaged was not only sanctioned by the "commander of the American troops, but, as "appears by the record, was permitted by the "Executive Department of the government,

"whose policy it was to conciliate, by kindness
"and commercial intercourse, the Mexican pro
"vinces bordering on the United States, and by
"that means weaken the power of the hostile
"government of Mexico, with which we were
"at war. It was one of the means resorted to
"to bring the war to a successful conclusion.

"It is certainly true, as a general rule,
"that no citizen can lawfully trade
"with a public enemy; and, if found
"to be engaged in such illicit traffic, his
"goods are liable to seizure and confiscation.
"But the rule has no application to a case of
"this kind; nor can an officer of the United
"States seize the property of an American citi-
"zen for an act which the constituted authori-
"ties, acting within the scope of their lawful
"powers, have authorized to be done."

And in referring to this case in Dow *v.* Johnson the Court says: "We do not controvert the doctrine of Mitchell *v.* Harmony, reported in the 13th of Howard, on the contrary, we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our government."

Raymond *v.* Thomas, 91 U. S., 712, simply held that General Canby, while military commander in South Carolina, had no right by his order to nullify a decree of a Court of competent jurisdiction. This suit was between third parties, and as General Canby was not a party, it did not involve any question as to his personal liability to third parties. This was also true in Planter's Bank *v.* Union Bank, 83 U. S., 483.

The cases *ex parte* Milligan, Smith *v.* Shaw, McConnell *v.* Hampton, cited on pages 32 and 33 of plaintiff's brief, show that the question involved in this case was not there involved.

Beckwith *v.* Bean, 93 U. S., 266, was a case of an arrest by a provost marshal of a citizen *in Vermont* during the Rebellion without a warrant. As Ver-

mont was not a conquered country, and it was not then in a state of war against the party represented by the marshal, the decision there can have no application to our case.

Ex parte Milligan, 71 U. S., 2, simply defines the jurisdiction of courts marshal, and that Indiana was not the seat of war and that the Civil Courts had jurisdiction.

The other cases cited show that the point here involved was not there considered.

POINT VI.

The only question to be determined is simply whether there was a war, and not whether it is successful.

The unsuccessful officer is liable to be tried for treason, but this in no way affects his exemption to answer for his acts as such officer in a civil action. This exemption of the unsuccessful party is referred to in the above quotation, and was directly passed upon in Ford *v.* Surget, 97 U. S., 594.

> " A, a resident of Adams County, Missis-
> " sippi, whose cotton was there burnt by B, in
> " May, 1892, brought an action for its value
> " against the latter, who set up a defense that
> " that State, whereof he was at that date a
> " resident, was then in subjection to and under
> " the control of the 'Confederate States'; that
> " an act of their congress, approved March 6,
> " 1862, declared that it was the duty of all
> " military commanders, in their service to de
> " stroy all cotton whenever, in their judgment,
> " the same should be about to fall into the
> " hands of the United States; that, in obedience
> " to that act, the commander of their forces in
> " Mississippi issued an order, directed to his
> " subordinate officers in that State, to burn all

" cotton along the Mississippi River likely to
" fall into the hands of the forces of the
" United States; that the provost marshal
" of that county was charged with executing
" within it that order; that A's cotton was
" likely to fall into the hands of the United
" States; that the provost marshal ordered and
" required B to burn it, and that B did burn it
" in obedience to the said act and the orders of
" that commander and the provost marshal.
" *Held*, that the said act, as a measure
" of legislation, can have no force in any
" Court recognizing the Constitution of the
" United States as the supreme law of the
" land. That it did not assume to confer upon
" such commanders any greater authority than
" they, by the laws and usages of war, were
" entitled to exercise. That the orders, as an
" act of war, exempted a soldier of the Con-
" federate army who executed them from lia-
" bility to the owner of the cotton, who, at the
" time of its destruction, was a voluntary resi-
" dent within the lines of the insurrection."

* * * * * *

" We assume that the following propositions
" are settled by, or are plainly to be deduced
" from, our former decisions:

* * * * * *

" The Confederate Government is to be re-
" garded by the courts as simply the military
" representative of the insurrection against the
" authority of the United States.

" To the Confederate army was, however,
" conceded, in the interest of humanity, and to
" prevent the cruelties of reprisals and retalia
" tion, such belligerent rights as belonged under
" the laws of nations to the armies of independ-
" ent governments engaged in war against each
" other,—that concession placing the soldiers
" and officers of the rebel army as to all mat-
" ters directly connected with the mode of pro-

"secuting the war, 'on the footing of those "engaged in lawful war,' and exempting 'them "from liability for acts of legitimate warfare.'

* * * * * *

"It would seem to be a logical deduction from "these doctrines—a deduction strengthened by "considerations of humanity and public neces- "sity—that the destruction of the same cotton, "under the orders of the Confederate military "authorities, for the purpose of preventing it "from falling into the hands of the Federal "army, was, under the circumstances alleged in "the special pleas, an act of war upon the part "of the military forces of the rebellion, for "which the person executing such orders was "relieved from civil responsibility at the suit of "the owner voluntarily residing at the time "within the lines of the insurrection."

POINT VII.

Plaintiff's exception to the rejection of evidence to show malice are without merit. Plaintiff's claim that the acts of General Hernandez were malicious or unnecessary then would not confer jurisdiction on the civil courts.

This was also considered in Dow *v.* Johnson, *supra*, at page 165:

> "Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction they would always be supplied in every variety of form. An inhabitant of a bombarded city would have little hesitation in declaring the bombardment unnecessary and cruel."

In justice to General Hernandez it should be stated that there is no evidence whatever in the case to show that the plaintiff was singled out as one who should not leave Bolivar and was not treated as others, or that the orders not to leave Bolivar were not general.

CONCLUSION.

The whole question is summed tersely in Dow *v.* Johnson, *supra.*

"The question here is: What is the law "which governs an army invading an "enemy's country? It is not the civil law "of the invaded country; it is not the civil "law of the conquering country; it is "military law—the law of war—and its "supremacy for protection of the officers "and soldiers of the army, when in service "in the field in the enemy's country, is as "essential to the efficiency of the army as "the supremacy of the civil law at home, "and, in the time of peace, is essential to "the preservation of liberty."

The judgment appealed from should be affirmed.
March, 1897.

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